IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 77-1575, 77-1648, 77-1662

FEDERAL COMMUNICATIONS COMMISSION,
AMERICAN CIVIL LIBERTIES UNION,
NATIONAL BLACK MEDIA COALITION, ET AL.,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, ET AL.,
Respondents.

RESPONSE TO BRIEF FOR THE UNITED STATES ON BEHALF OF RESPONDENT MIDWEST VIDEO CORPORATION

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On July 25, 1978, the United States filed its Brief in the above-referenced proceedings, urging that the petitions for a Writ of Certiorari be granted. Since the United States raises matters in its Brief to which Respondent Midwest Video Corporation ("Midwest") has not had an opportunity to respond, Midwest is submitting this response.[1]

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[1] Though in form a Brief in support of the Commission's Petition, the United States was a party to the proceedings in the Court of Appeals, and in substance its Brief is a late-filed Petition for a Writ of Certiorari, to which Midwest would ordinarily be entitled to file an Opposition. Midwest is filing simultaneously herewith a Motion for Leave to File Response to Brief of the United States.

I. STATUTORY AUTHORITY

The United States argues that the Court of Appeals conclusion that the Federal Communications Commission's ("the Commission") rules here at issue exceeded its jurisdiction cannot be reconciled with this Court's decisions in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) and *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). It argues that those rules "are designed to serve the very same statutory policies that the Court in *Midwest Video* held established the basis for the Commission's jurisdiction." (Br. p. 9) and that the mandatory origination rules before the Court in *Midwest Video* "had no closer nexus to the services provided by broadcasters than the capacity, access and equipment rules" (Br. p. 10) here at issue. This argument, it should be noted, is in marked contrast to the argument the United States put forth in its Brief to this Court in *Midwest Video,* where it argued that the rule then before the Court was closely related to the services provided by broadcasters:

> "Even if Commission regulation of CATV must be substantially related to regulation of broadcasting, the requisite relationship is present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of *the same basic standards of responsibility to the public that are imposed on broadcasters.*" (Emphasis supplied) Brief for the United States and the Federal Communications Commission (filed February 24, 1972), p. 8.

The Court of Appeals, in its Opinion (A. 20-64) and Midwest in its Brief in Opposition to Petitions for

Writs of Certiorari (Midwest Br. p. 14-17) have demonstrated that, in contrast, the access and related rules[2] go far beyond any basic standard of responsibility imposed on broadcasters.

In an effort to salvage its jurisdictional argument, the United States argues that Congress has acted in several ways to confirm this Court's conclusion that the Commission's regulation of cable television is Congressionally authorized (Br. pp. 10-11, n. 6). But the two examples cited simply result in cable systems and broadcast stations being treated in the same manner—a situation in no way contrary to the Court of Appeals view of the Commission's jurisdiction.[3]

In response to the Court of Appeals holding that the access rules impermissibly impose common carrier obligations on cable systems (A. 59-64), the United States concedes that "the access rules can be viewed as a limited form of common carriage obliga-

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[2] The United States also argues (Br. p. 3) that, if the Commission's access and related rules are divided into three parts for purposes of analysis, different considerations for purposes of statutory and constitutional analysis can then be discerned. The short answer to this argument is that, as the United States later concedes (Br. p. 14, n. 8), the equipment availability aspect of the rules is closely tied to the access aspects. With respect to the channel capacity rule, the Court of Appeals itself recognized that there may be aspects of that rule that are not tied to access, and it invalidated the channel capacity requirement only to the extent it relates to access (A. p. 18, n. 21).

[3] There is now under consideration in the Congress a complete rewrite of the Communications Act in H.R. 13015, introduced on June 7, 1978, and that proposal excludes cable television from federal regulation. Whether or not that proposed legislation is adopted in its present form, Congress will, in its consideration of Communications Act rewrite, be able to take such action as it deems appropriate in light of the Court of Appeals decision.

tion" (Br. p. 12, n. 7). However, it then argues that this fact does not place the rules beyond the Commission's jurisdiction over cable television because the mandatory signal carriage rules that were before this Court in *Southwestern Cable Co.* imposed a limited form of common carrier obligation and the regulatory means that are appropriate and permissible with respect to the broadcast medium are not necessarily identical to the means appropriate and permissible with respect to cable television. There are two basic weaknesses with this argument.

First, neither the Court of Appeals opinion nor Midwest's Brief takes the position that the Commission's regulatory means must be identical with respect to the broadcast medium and cable television. This point was implicitly recognized by this Court in *Southwestern Cable Co.*, where the mandatory carriage rules before the Court had no direct analogue in broadcast regulation. Nevertheless, the Commission's authority to adopt such a rule was affirmed because the rule was in furtherance of the Commission's authority to allocate broadcast facilities, establish the areas and zones to be served by broadcast stations, and promote the implementation of its broadcast allocation scheme. 157 U.S. at 173-178. In a footnote, the Court in *Southwestern Cable Co.* specifically noted that neither it nor the Commission considered the cable systems there before it to be common carriers. 157 U.S. at 169, n. 29. Moreover, as shown by the Court of Appeals in its opinion (A. 59-64) and Midwest in its Brief (Midwest Br. pp. 16-17), common carrier regulation of cable systems is not only not based on or ancillary to any broadcast provisions of the Communications Act, but common carrier regulation of broadcasters is specifically prohibited.

Second, the matter of whether the common carrier provisions of the Act provide a basis for Commission jurisdiction is in any event not ripe for review by this Court. The Commission did not rely on those provisions to support its jurisdiction either in the Report and Order adopting the access rules (A. 93-167), its opinion on reconsideration of that Report and Order (A. 182-202), its Brief or argument before the Court of Appeals, or its Petition for Writ of Certiorari. Difficult legal and policy questions would be raised if cable systems were to be regulated pursuant to the common carrier provisions of the Act. The Commission's current view that it must regulate common carriers pursuant to all of the statutory requirements of Title II of the Act and that it does not have the authority to waive various provisions of Title II was affirmed in *AT&T Co.* v. *U.S.*, 572 F.2d 17 (2nd Cir. 1978), and two Petitions for Writs of Certiorari to the Court of Appeals in that case are pending (Nos. 77-1540 and 77-1690).[4] Thus, if the Commission has the authority to require cable systems to engage in a common carrier activity, the Commission would have to reexamine the nature of its regulation to determine its consistency with the requirements of Title II. However, at least for the

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[4] In that proceeding, the United States has taken the position that, since the Commission's opinion can be read as subjecting the business entities there before the Commission to full Title II common carrier regulation for policy reasons rather than because such regulation was mandated by the Act, the issue of whether or not the Commission has the discretion to decline to apply full Title II regulation to some common carriers is not ripe for review. It is inconsistent for the United States to argue that that proceeding is not ripe for review but that the common carrier provisions of the Act might support the Commission's action here when the Commission has not even addressed the matter.

present the Commission has made it clear that, as a matter of policy, it does not intend to regulate cable systems as common carriers, *Cable Television Report and Order,* 36 FCC 2d, 143, 197 (1972), *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order,* 36 FCC 2d 326, 352 (1972), *aff'd. sub nom. American Civil Liberties Union, Inc.* v. *FCC,* 523 F.2d 1344 (9th Cir. 1975), and consideration of the common carrier provisions of the Act as the basis for Commission authority would therefore be premature and inappropriate.

II. FIRST AMENDMENT

The United States recognizes in its argument that the Court of Appeals resolution of the First Amendment issue turns on the applicability of *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), but it seeks to distinguish that case on several inconsistent and incorrect grounds, as follows.

First, it stresses the similarities of cable systems and broadcasters (Br. pp. 14-15), presumably in order to bring cable systems within the ambit of First Amendment restrictions applicable to broadcasters but not newspapers. But if for First Amendment purposes cable systems are analogous to broadcasters, then this Court's opinion in *Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973), raises serious questions about whether access rules are consistent with the Commission's authority over broadcasters. The United States does not discuss that case, though it was specifically relied on by Midwest at pp. 22-23 of its Brief.

Second, the United States argues that the imposition of access obligations is unrelated to the content

of what the cablecaster otherwise transmits (Br. pp. 15-16). But this is not correct. As the United States recognizes (Br. p. 4), automated services such as time and weather services must give way to access. Moreover, there are other types of automated services which might have to be displaced. The Commission in its Report and Order here under review refers specifically to community information and consumer price lists and indicates that it will consider each such situation individually on its merits (A. 143, n. 19). Other types of automated services presently offered by cable systems include news, sports, and stock market information. Thus, the access rules can require either the displacement of various types of automated services the cable operator and its subscribers may prefer, or the Commission may be called upon to make judgments as to which type of speech is to be preferred. Moreover, even when present automated services are not displaced, reservation of one or more channels for access can prevent the cable operator and its subscribers from receiving other types of desirable programming. See Midwest Br. pp. 7-8. Satellite communications is only in its infancy, but already it provides to cable operators throughout the country the ability to receive sports, religious programming, pay cable programming, and additional television signals not otherwise available, and other types of services delivered by satellite are likely to develop and may be precluded from carriage on some cable systems because one or more channels are being utilized to provide required access services. The access rules thus do affect the content of what cable systems transmit "in taking up space that could be devoted to other material the [cable system] would

have preferred to [present]." *Miami Herald Publishing Co.* v. *Tornillo, supra,* at 256.

Third, the United States argues that, because there are important similarities between cablecasting and telephone or telegraph carriage, the government can require cable systems to carry messages they might prefer not to carry (Br. pp. 16-18). But the speech of telephone and telegraph companies is not restricted by carrying the messages of others since that is the very purpose for which telephone and telegraph companies construct their facilities. Cable companies, by way of contrast, do originate their own programs and have the same interest in the content of such originations as does any other medium of expression.

III. CONCLUSION

For the foregoing reasons and the reasons stated in its Brief in Opposition, Midwest urges that the Petitions for Writs of Certiorari be denied.

Respectfully submitted,

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